

**Letter of Findings: 04-20140514**  
**Gross Retail Tax**  
**For the Years 2011, 2012, and 2013**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

### HOLDING

Out-of-state service provider was required to pay sales tax on purchases of diesel fuel when it was unable to provide sufficient documentation establishing that it paid the tax at the time of each original purchase. However, the Department adjusted the assessment based on the results of documentation obtained from service provider's fuel vendors.

### ISSUE

#### **I. Gross Retail Tax - Diesel Fuel Purchases.**

**Authority:** IC § 6-2.5-2-1(a); IC § 6-2.5-7-3(b); IC § 6-8.1-5-1(a); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); IC § 6-8.1-5-4(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that an audit assessment of sales tax on the purchase of diesel fuel overstated the amount of tax owed.

### STATEMENT OF FACTS

Taxpayer is an out-of-state company in the business of providing services to utility companies. Taxpayer earns money by constructing and maintaining electrical power lines and substations. Taxpayer employs personnel who work in Indiana and who operate Taxpayer's vehicles in this state.

Taxpayer's employees purchased diesel fuel from an Indiana vendor without paying sales tax on the purchase. An "Indiana General Sales Tax Exemption Certificate" (ST-105) was provided to the Indiana vendor.

During the course of the audit, Taxpayer provided the Indiana Department of Revenue ("Department") information detailing the total amount of diesel fuel purchased from Indiana vendors during 2011, 2012, and 2013.

The Department's audit assessed additional use tax on the ground that Taxpayer was not entitled to claim the "public transportation" sales tax exemption on purchases of diesel fuel.

Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis of the protest. This Letter of Findings results.

#### **I. Gross Retail Tax - Diesel Fuel Purchases.**

### DISCUSSION

The issue is whether Taxpayer has established that the Department's assessment of use tax overstates the amount of tax actually due.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and each taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v.

Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). In reviewing a taxpayer's argument, the Indiana Supreme Court has held that, when it examines a statute that an agency is "charged with enforcing . . . we defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party." Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

#### **A. Audit Results.**

Taxpayer's employees regularly purchased diesel fuel in Indiana. At least one of Taxpayer's employees purchased fuel from an Indiana vendor without paying Indiana sales tax. The employee was able to purchase the fuel without paying sales tax because the employee presented the vendor an Indiana General Sales Tax Exemption Certificate (ST-105) using the Taxpayer's United States Department of Transportation ("USDOT") number as a state identification number. As noted in the audit report:

The Indiana Department of Revenue . . . accepts the USDOT number in lieu of state issued taxpayer identification numbers for purchases by companies predominately engaged in public transportation.

The audit concluded that Taxpayer should have paid sales tax on each purchase of diesel fuel because Taxpayer was not entitled to claim the "public transportation" sales tax exemption. As explained in the audit report:

Public transportation is defined as the transportation of people or property for consideration. The fact that a company has a number issued by the USDOT does not in itself mean the company provides public transportation. [Taxpayer] is not engaged in public transportation and is therefore not entitled to this exemption.

Whether or not Taxpayer is entitled to claim the "public transportation" exemption was not an issue during the audit and is not at issue in this Letter of Findings. As the audit report notes, "The company agrees and this fact is not in dispute."

Neither is there any dispute that, absent a statutory exemption, sales tax is collected on each sale of tangible personal property such as diesel fuel.

The Indiana Code expressly states that a retail merchant who sells special (diesel) fuel in Indiana is required to collect sales tax at the time of the sale pursuant to IC § 6-2.5-7-3(b) which provides specific requirements:

With respect to the sale of special fuel or kerosene which is dispensed from a metered pump, unless the purchaser provides an exemption certificate in accordance with IC [§] 6-2.5-8-8, a retail merchant shall collect, for each unit of special fuel or kerosene sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:

. . .

Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#).

During the course of the audit, Taxpayer was asked to provide copies of fuel purchase invoices but was "not able to provide copies of the individual invoices showing any additional information about these purchases such as pump numbers or taxes remitted." The audit concluded that "[w]ithout invoice copies it was not possible to tell if the fuel was purchased from exempt or taxable pumps or if sales taxes were paid at the time of payment for the fuel."

#### **B. Taxpayer's Response.**

Taxpayer engaged the services of an Indiana company "to provide [Taxpayer] with audit support and ensure the correct amount of tax remittance." To that end, Taxpayer's representatives sought documentation from "all Indiana retail fueling sites for which [Taxpayer] purchased diesel fuel during the audit period in order to determine if any diesel fuel was purchased exempt of the Indiana sales taxes."

According to Taxpayer, it "received over 62[percent] of the [requested] data back from the retailers showing that

the sales taxes were paid on average of approximately 97[percent] of all diesel fuel gallons purchased through those retail sites." Taxpayer admits that it received data from "two fuel retailers that exempted the sales tax during the time of purchase at the point-of-sale device in the pump . . . ."

Some of the retailers responded to Taxpayer's request for documentation; some did not. Some of the respondents indicated that they did not operate exempt pumps at their business location but there was "no one with authority to sign" the requested response. Some of the documentation returned from the vendors was completed and signed; some was not signed. Some of the documentation contained a signature by someone purporting to be in authority to verify the result, but some of the documentation was not signed by anyone in apparent authority to provide or verify the requested information.

Taxpayer asserts that the information obtained from its fuel vendors is sufficient to justify a substantial adjustment to the audit assessment.

### **C. Hearing Analysis.**

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-7-3(b). "The retail merchant shall collect the tax as agent for the state." Id.

IC § 6-8.1-5-1(a) states that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department."

In the absence of any source documentation, the Department made a "proposed assessment" of additional sales/use tax. The proposed assessments were appropriate because Taxpayer failed to maintain original documentation clearly establishing that sales tax was paid at the time its employees purchased fuel without claiming an unwarranted exemption.

In failing to maintain these detailed records, Taxpayer ignored its statutory responsibility to do so. "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for tax by reviewing those books and records." IC § 6-8.1-5-4(a). IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times."

Taxpayer is a sophisticated business which routinely purchases large amounts of diesel fuel and failed to assure that it was meeting its responsibility to pay Indiana sales tax on each purchase. However, Taxpayer has made substantial, after-the-fact efforts to document its assertion that it purportedly paid sales tax each time it purchased fuel from its vendors. Taxpayer's representatives prepared a detailed request for vendor information, distributed those requests to its fuel vendors, and compiled the results of those requests. In some cases, Taxpayer's representatives made on-site visits to vendors who did not initially respond to the request for documentation. To a limited extent, Taxpayer has met its responsibility of providing "documentation explaining and supporting his or her challenge that the Department's position is wrong." *Scopelite* 939 N.E.2d at 1145.

The Department is prepared to make a limited adjustment of the assessment based on the results of the documentation provided by the fuel vendors. The Department will not make any adjustment for purchases made from vendors who did not respond to Taxpayer's request for information. The Department will not make an adjustment based on vendor documentation which was unsigned or which was not signed by a person with apparent authority ("manager," "owner," "controller," "vice president," "secretary treasurer," "office manager," "chief financial officer (CFO)," "supervisor," "tax manager," "business manager," "director of taxes," "tax analyst") to accurately respond to Taxpayer's request for information.

The Department does not agree that the Taxpayer met its responsibility of establishing that the audit assessment was "wrong" as required by IC § 6-8.1-5-1(c). The Department does not agree that the limited information obtained from its vendors should be extrapolated to exempt any of the sales by vendors who did not respond to the request for information or to vendors who provided incomplete results. However, the Department does agree that the assessment should be adjusted to reflect the specific results of information obtained from its fuel vendors as described in this Letter of Findings. The Department's Audit Division is requested to make that adjustment.

### **FINDING**

Taxpayer's protest is sustained in part and denied in part.

*Posted: 05/27/2015 by Legislative Services Agency*

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